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No. 87-1876

# In the Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATED CONVALESCENT ENTERPRISES, INC.,
PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## TABLE OF AUTHORITIES

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

Petitioner contends that an action dismissed with prejudice against a corporate entity that was the sole shareholder of petitioner, but continued to judgment against three other entities related to petitioner, bars a separate action on the judgment against petitioner as the alter ego of the three entities.

1. This case arises out of an action brought by the United States to enforce a judgment obtained against three convalescent homes for Medicare overcharges (Pet. App. B1). The overcharges, amounting to more than $1 million, were made between 1967 and 1969 (*id.* at B2). Recovery of those amounts by the United States, however, has not yet taken place because of what the district court described as "delay tactics and other bad faith actions" (*ibid.*) and "fraudulent conduct" (*id.* at B5; see also *id.* at B11). See generally *United States* v. *California Care Corp.*, 709 F.2d

1241 (9th Cir. 1983); *United States* v. *Associated Convalescent Enterprises, Inc.*, 766 F.2d 1342 (9th Cir. 1985).

The action on the judgment was brought against petitioner as the alter ego of the three convalescent homes. In the original action against the three homes, petitioner was not named as a defendant. The government did name as a defendant in that action petitioner's sole shareholder, Aruba Bonaire Curacao Trust Company (Aruba), a Bahamas corporation. Aruba was not sued under the theory that it was the alter ego of petitioner; instead, the government contended that assets of the three convalescent homes otherwise subject to the government's interest had been transferred to petitioner and then distributed by it to Aruba in derogation of the government's rights under the federal priority statute, 31 U.S.C. (1976 ed.) 191, 192. The factual basis for the government's suit against Aruba under the priority statute was a certificate of winding up and dissolution filed with the California Secretary of State. The certificate stated that petitioner had been dissolved; that Aruba was petitioner's sole shareholder and had either paid for or assumed all of petitioner's debts; and that petitioner's assets had been transferred to Aruba (Pet. App. B6).

The government subsequently learned that the statements in the certificate of winding up and dissolution were false, and that petitioner's assets had never been transferred but had been frozen pursuant to a court order in the California state courts (Pet. App. B6). To expedite the litigation, the government sought a voluntary dismissal of Aruba (*id.* at B3). On November 24, 1981, the district court entered an order dismissing Aruba without prejudice. By judgment entered on January 22, 1982, however, the district court dismissed Aruba as a defendant *with* prejudice (*ibid.*). The government did not seek reconsideration of the judgment order.

Following entry of judgment against the three convalescent homes, the government sued petitioner as their alter ego in an effort to enforce the judgment. Petitioner resisted this effort, contending that petitioner and Aruba were in "privity" and that the dismissal with prejudice of Aruba in the underlying action therefore precluded the government's suit on the judgment against petitioner. The district court rejected that contention (Pet. App. B5-B7). The district court also held that petitioner was the alter ego of the three convalescent homes and that therefore the government's previously obtained judgment against the homes should be enforced against petitioner (*id.* at B7-B12).

The court of appeals affirmed without opinion (Pet. App. A1). Judge Boochever dissented, concluding that, because "the issue of 'alter ego' liability *could* have been raised in th[e] earlier action," res judicata principles *required* that it be raised in that action rather than this one. Judge Boochever therefore would have remanded the case in order to give the government an opportunity to seek relief from the order in the earlier action dismissing Aruba with prejudice. *Id.* at A2. A petition for rehearing with suggestion for rehearing en banc was (contrary to the statement in the petition (at 6)) denied without dissent (Pet. App. C1).

2. The court of appeals' rejection of petitioner's res judicata and collateral estoppel arguments is correct and does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

a. The dismissal of Aruba with prejudice in the underlying action against the three convalescent homes does not bar the action against petitioner to enforce that judgment. "Under res judicata, a final judgment on the merits bars further claims by parties or their privies on the

same cause of action." *United States* v. *Mendoza*, 464 U.S. 154, 158 n.3 (1984). Res judicata did not bar the second action here because it did not involve the "same cause of action."

The action to enforce the judgment against petitioner on an alter ego theory is not the same "cause of action" or "claim" as the claim against Aruba under the federal priority statute. See generally *Nevada* v. *United States*, 463 U.S. 110, 130 & n.12 (1983) (discussing definition of "same cause of action"). The final judgment in favor of the United States in the underlying action against the convalescent homes gave rise to a new and separate claim by the United States on the judgment, with new rights of enforcement. Restatement (Second) of Judgments § 17(1) & comment a (1982); *id.* § 18(1). Further, the injuries alleged in the two actions were distinct: in the action against Aruba, the government claimed that assets of the three convalescent homes had been transferred to Aruba in derogation of the government's rights as creditor of the homes; in the second action, the government claimed that petitioner had sufficient control of the three homes that the government should be permitted to enforce its judgment against petitioner as well. Res judicata therefore did not bar this action.*

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* The theory adopted by Judge Boochever in dissent proves too much. If it were true, as Judge Boochever suggested, that a plaintiff suing one party must raise (or by not raising, forfeit) every theory that it *could* raise in order to recover from a nonparty in privity with the named party, then the United States would have been required to raise the alter ego theory in the first action simply because petitioner was in privity with the convalescent homes. Under this theory, it would be irrelevant whether or not petitioner was in privity with Aruba; the action against petitioner would be barred even if Aruba had never been a party. It has never been the law, however, that a plaintiff, in an action to establish liability, must also anticipate the issues that will have to be

b. Nor does the dismissal with prejudice of the action against Aruba bar the action on the judgment against petitioner under principles of collateral estoppel. "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen* v. *McCurry*, 449 U.S. 90, 94 (1980). The "general limitation the Court has repeatedly recognized" in this context, however, is that "the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case" (*id.* at 95). A claim that is voluntarily dismissed at the request of a party, even one that is dismissed "with prejudice," does not meet the "actual litigation" requirement that is the prerequisite to estoppel. *Lawlor* v. *National Screen Serv. Corp.*, 349 U.S. 322, 327 (1955); *United States* v. *International Bldg. Co.*, 345 U.S. 502, 505-506 (1953). Thus even assuming that petitioner and Aruba were in "privity" for purposes of collateral estoppel, the dismissal of the action against Aruba in the circumstances of this case would not preclude relitigation of any related issue against petitioner.

3. Petitioner's reliance on *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981), is misplaced. There, plaintiff's case had been dismissed on the merits, on the ground that it had no cause of action. Plaintiff thereupon filed the same claim against the same defendants in an action in

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litigated in order for the plaintiff to enforce the judgment that will be entered once liability has been established. See, *e.g.*, *United States* v. *Southern Fabricating Co.*, 764 F.2d 780 (11th Cir. 1985) (action by United States to recover against corporate parent on judgment rendered against subsidiary in action in which parent was not a party); cf. Restatement (Second) of Judgments § 49 (1982).

state court, which was removed to federal court and dismissed a second time, on the basis of res judicata. While plaintiff's appeal of the second dismissal was pending, this Court held, in an unrelated case, that the cause of action originally stated by the plaintiff was a valid one. On review of the res judicata dismissal, the court of appeals created a "public policy" exception to the rules of res judicata to permit the plaintiff's case to go forward (*id.* at 398). This Court held that "such an unprecedented departure from accepted principles of res judicata is unwarranted" (*id.* at 399).

In this case, in contrast, no "public policy" exception to the normal rules of res judicata is at issue. Instead, the normal rules of res judicata do not bar this action because it does not involve the same claim as the first action against Aruba. The first action was brought to establish liability for Medicare overcharges. This action was brought to recover on a judgment. *Federated Dep't Stores* is thus inapplicable to this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
*Solicitor General*

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